This book offers a radical challenge to all existing accounts of the common law’s development. Contrary to received jurisprudential wisdom, it maintains that there is no grand theory that will satisfactorily explain the dynamic interactions of change and stability in the common law’s history. Offering fresh and original readings of Charles Darwin’s and Hans-Georg Gadamer’s works, the book shows that law is a rhetorical activity that can only be properly appreciated in its historical and political context; tradition and transformation are locked in a mutually reinforcing but thoroughly contingent embrace. In contrast to the dewy-eyed offerings of much contemporary work, it demonstrates that, like life, law is an organic process (i.e., events are the products of functional and localized causes) rather than a miraculous one (i.e., events are the result of some grand plan or intervention). In short, common law is a perpetual work-in-progress – evanescent, dynamic, messy, productive, tantalizing, and bottom up.

Allan C. Hutchinson is professor and associate dean at Osgoode Hall Law School at York University in Toronto. He has published on a variety of subjects, including civil litigation, constitutional law, torts, jurisprudence, the legal profession, and legal ethics. In 2004, he was elected a Fellow of the Royal Society of Canada and awarded Osgoode Hall’s inaugural Excellence in Teaching Award.
Evolution and the Common Law

ALLAN C. HUTCHINSON
Osloode Hall Law School
York University
This Book is Dedicated to

my Pilot of the Purple Twilight
Our fate, for better or worse, is political. It is therefore not a happy fate, even if it has an heroic sound, but there is no escape from it, and the only possibility of enduring it is to force into our definition of politics every human activity and every subtlety of human activity. There are manifest dangers in doing this, but greater dangers in not doing it.

LIONEL TRILLING
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Preface

This preface can be short and sweet. This project began, like most of my academic undertakings, more by chance than design. After writing a couple of papers, I realized that a certain pattern was taking shape and a unifying theme was emerging. In a manner of speaking, a book was beginning to evolve. This is the final product of that trial-and-error process; there have been the usual mutations, couplings, and mistakes along the way. Some of the work saw the light of day in earlier essays in *Legal Studies*, *Chicago-Kent Law Review*, *Current Legal Problems*, and *Irish Law Teachers*. Nevertheless, the contents of the book are almost entirely original in source and style, if nothing else.

As usual, many people have played important parts in helping me to complete this book. A variety of students have put in time as research assistants and have tried to keep me on the straight and narrow – Simon Lee, Nigel Marshman, Rishi Bandhu, Archana Mathew, Jim Smith, Abbas Sabur, Merel Veldius, Daved Muttart, and Luke Woodford. I have also benefited from a host of critics and colleagues, mostly friendly, who have shared their time and insights – Harry Arthurs, Derek Morgan, Richard Lucy, Tsachi Keren-Paz, Neil Duxbury, Celia Wells, Joanne Conaghan, Michael Freeman, Toni Williams, Francis Jay Mootz III, and John McCamus. In particular, I am especially grateful to Simon Archer, whose erudition, good humor, and sheer talent got this project off on the right foot; to Charles Lynch, who, catching the spirit of the project, saw me through to the end, and to Casia Czajkowski, who completed the index and tidied up the final manuscript. I was the grateful beneficiary of a generous grant from the Social Sciences and Research Council of Canada.

Most of all, this book is for Beverley. We met a couple of days after I made my first serious foray into the world of Darwinian scholarship through a lecture at University College, London in November 2000 – almost 141 years
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to the day on which *The Origin of Species* was first published. The intervening time has been a great ride so far, and an exciting road stretches ahead. She has shown me all that is best in love and life, giving me my joy and forgiving me my crotchets. This book is, I hope, the best blah-blah-blah that I can presently muster.

*October, 2004*
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